

COSMAS LUCKYSON ZAVAZAVA
and
VONGAI ZAVAZAVA
versus
JONAH TENDERE
and
TENDAI IDZAI ANANIA TENDERE
and
THERMO-DYNAMICS REAL ESTATE
and
THE REGISTRAR OF DEEDS N.O.

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 15 and 23 September 2015

Opposed application

T. Mpfu, for the applicant
F. Nyamayaro, for the 1st & 2nd respondents
3rd respondent in default

MATHONSI J: It would appear that conveyancing laws of this country are not foolproof because fraudsters continue to exploit the weaknesses in the procedure for registration of transfers to defraud innocent property seekers. The leakages in the system have meant that cases of unlawful transfers of immovable property continue to reach the courts with alarming frequency. For how long will these fraudsters, who strut among communities, continue to hold sway, to make a mockery of transfer rules to milk unsuspecting home seekers dry in order to make a dishonest living? These shameless individuals bring the whole process of private ownership of immovable property and registration of title to disrepute. There is a pressing need for reforms to be introduced in conveyancing rules in order, not only to modernise the system, but also to render the system foolproof and hopefully protect property owners.

Counsel for the applicant has drawn my attention to the remarks of Holmes JA, which are apposite, in the case of *Oakland Nominees Ltd v Gelria Mining & Investment Co Ltd* 1976 (1) SA 441 (A) 452A where the learned judge of appeal made emphasis that our law

jealously protects the right of ownership and the correlative right of the owner over his property. He further stated:

“The legal principle enunciated above is solidly noble because since time immemorial, at every stage of human evolution, societies have suffered the inevitable unfortunate phenomenon of having in their midst, an array of thieves, fraudsters, robbers, cutthroats, the throwbacks in evolution etc with no qualms whatsoever in employing force or chicanery to dispossess fellow humans of ownership of their property. If the law did not jealously guard and protect the right of ownership and the correlative right of the ownership to his/ her property, then ownership would be meaningless and the jungle law would prevail to the detriment of legality and good order.”

Just how does a fraudster, and a thief coveting another person’s property, succeed to advertise the property, attract a buyer, sign a sale agreement and engage a conveyancer to successfully transfer that property from the true owner to the buyer before gleefully skipping away with the proceeds?

Cosmas Luckyson Zavazava is employed by an international organisation which posts him to various parts of the world and is currently stationed in Geneva Switzerland. He and his wife Vongai identified an underdeveloped piece of land, stand 816 Ruwa Township of stand 659 Ruwa Township (the property) and purchased it on 29 November 1996. They took transfer on 20 March 1997 and held title by Deed of Transfer number 997/1997. They did not commence developing the property owing to their sojourn in foreign territories in pursuit of the husband’s employment. When they tried to do so in 2013, they discovered to their amazement that Jonah Tendere and Tendai Idzai Anania Tendere, husband and wife, who are the first and second respondents in this matter, were busy trying to develop the property.

It turns out that, unbeknown to the Zavazava family, who are the applicants in this matter, a stranger by the name Wilson Madziva who is now deceased and was running an estate agency known as Thermo-Dynamics Real Estate (what a name), which is the third respondent in this matter, had advertised the property through the agency of another estate agent, Elite Real Estate (Pvt) Ltd, attracting the interest of the first and second respondents. A sale agreement was entered into between them and the third respondent and signed on 17 July 2009 in terms of which the property was sold for \$8 500.00. It was subsequently transferred from the third respondent to the first and second respondents with the active involvement of the late Wilson Madziva, by Deed of Transfer Number 204/2011.

The third respondent had itself taken transfer of the property by Deed of Transfer Number 1680/2009. The conveyance of the property from the applicants to the third respondent was handled by one Walter Bherebhende, a conveyancer practising at Mavhunga

& Sigauke Legal Practitioners of Harare. The applicants say they never sold their property and never instructed Bherbhende to transfer it to the third respondent. Only Bherendere knows what transpired and he has deposed to an affidavit which has not been challenged stating:

“4. My knowledge of this matter is as follows:

4.1. In March 2009, I was practising under Messrs Mavhunga & Sigauke Legal Practitioners when I was approached by a Mr Wilson Madziva who was a client of our law firm and also the proprietor of an estate agent known as Thermo Dynamics Real Estate which is the third respondent herein.

4.2. Mr Madziva instructed me to process the transfer of stand 816 Ruwa Township of stand 659 Ruwa Township which was registered under the applicant’s names under Deed of Transfer No 997/1997 into the name of the third respondent.

4.3. I confirm that I was shown an agreement of sale which purported to have been signed by all the parties.

4.4. I then proceeded to prepare the necessary powers of attorney to pass transfer and I requested that all of the parties appear at our offices to attend to the signing of the declarations and powers of attorney. I also requested the parties to bring their original identity documents and the original title deed.

4.5. Wilson Madziva appeared on behalf of the third respondent and persons purporting to be the applicants also appeared on behalf of them with the original title deed and identity documents in the applicants names.

4.6. I confirm that I had no reason to suspect that the persons purporting to be the applicants were in actual fact not the applicants.

4.7. Accordingly the transaction proceeded as normal and after all normal channels and procedures were followed, the property only transferred into the name of the third respondent under Deed of Transfer No.1680/2009.

4.8. I was surprised when five years later I was approached by the police and advised that the persons who had appeared before me were in actual fact not the applicants. Unfortunately I had not made copies of the identity documents and I tried to access them from ZIMRA, however ZIMRA insisted that it would only release the same upon a court order compelling them to do the same.

4.9. I can however confirm that the parties who appeared before me are not the applicants in this present matter.

4.10. Mr Wilson Madziva is however now deceased therefore he is also not in a position to clarify the issues.

5. In the circumstances in light of the fact that initial transfer was done through a misrepresentation, I would aver that the applicants are entitled to the relief they seek in respect of cancellation of the title deeds.”

(The underlining is mine)

Therein lies the problem. The conveyancing instructions given to the conveyancer came from the purported purchaser of the property, Wilson Madziva representing the third respondent, and not from the purported sellers and owners of the property, the applicants. This did not stop the conveyancer, purporting to act on behalf of the sellers, from proceeding with such instructions. He says he only requested that all the parties should appear before him, which is as difficult to believe as it is very unlikely in the circumstances of a busy law practice, assuming his was also busy.

A conveyancer is the agent of the seller and undertakes transfer at the instance of the seller and not the purchaser. As long as legal practitioners in this jurisdiction do not grasp that basic fact, we will continue to have fraudulent transfers of property as occurred in this matter. I must add that as long as law firms continue to relegate conveyancing practice to clerks and paralegals the rot that is presently manifesting itself will perpetuate. For one thing these conveyancing clerks and lodging clerks do not appreciate the legal implications of the procedure provided for transfer and as far as they are concerned as long as the necessary documents have been signed, no matter by who, and the conveyancing fees paid, the job has been done. Invariably the conveyancer is merely presented with processed documents and happily appends his signature on the top of the deed and appropriates the fee before hastily leaving the office to play golf.

No effort is made to verify the documentation and to ensure compliance with the rules. In short the rules are adulterated for expediency and the most important element in legal practice, conveyancing, is reduced to a mockery. Once signed, the deeds are taken to the Deeds Registry by a lodging clerk for lodgement and although the contents announce to the world that the conveyancer appeared before the registrar of deeds to convey the transfer, in practice the conveyancer never does that. It is for that reason that we are now experiencing an influx in cases of fraudulent transfers.

What we have here therefore is an unfortunate situation indeed borne out of laxity and inattention. The conveyancer was remiss in a big way and only succeeded in transferring property belonging to the applicants unlawfully. A fraudster took that transfer and later sold the same property to the first and second respondents who are also victims of a fraud.

The question which arises therefore is what was the legal effect of all that activity and where does it leave the parties? The papers before me clearly demonstrate that the applicants did not sell their property to the third respondent. They did not transfer it either. That was done by someone else without their knowledge or consent. The position of the law in that regard is aptly stated by the leaned author R.H. Christie, *Business Law in Zimbabwe*, 2nd Ed, Juta & Co Ltd at p 149-150:

“An owner whose property has been sold and delivered without his consent remains the owner, as the seller cannot pass ownership that was not his. The true owner can bring a vindicatory action to recover his property from anyone, including a *bona fide* buyer, in whose hands he finds it. The general rule that the seller can give no better title than he has operates in favour of the true owner, unless the purchaser proves that the true owner is estopped from denying the seller’s authority to sell.”

Mc Nally JA developed that point further in *Mashave v Standard Bank of South Africa Ltd* 1998 (1) ZLR 436 (S) 438 C when he pronounced:

“The Roman-Dutch law protects the right of an owner to vindicate his property, and as a matter of policy favours him against an innocent purchaser. See for instance *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20 A-C. The innocent purchaser’s only defence is estoppel.”

The *nemo dat quod non habet and nemo plus iuris ad alium transferre potest quam ipse habet*, that is, no one can give what he does not have and no one can transfer any right greater than he himself possesses are firmly rooted in our legal science. Therefore, where a person who is not the owner and possesses no mandate to do so purports to transfer property, such transfer is a nullity. See Silberberg and Schoeman; *The Law of Property*, 2nd ed, p 72.

The applicants therefore have a vindicatory right against whomsoever is in possession of their property, even an innocent purchaser. The *actio rei vindicatio* is available to the owner whose property is in the possession of another without his authority or consent. Its concept is that an owner cannot be deprived of his property against his will. Such owner is entitled to recover the property from any person who is in possession of it without his consent. All the owner is required to prove is that he is the owner and that the property is in the possession of another at the commencement of the action. Proof of ownership shifts the onus to the possessor to prove a right of retention; See *Jolly v A Shannon & Anor* 1998 (2) ZLR 78 (H) 88 A-B; *Chetty v Naidoo* 1974 (3) SA 13 (A) 20 A-C; *Stanbic Finance Zimbabwe Ltd v Chivhungwa* 1999 (1) ZLR 262 (H).

It is regrettable that the possessors of the applicants’ property are an innocent couple which was trying to find a home for themselves and have lost their money to a trickster who has already met his maker. There is however a glimmer of hope for them because the third respondent, the vehicle through which Madziva operated, is said to be still operational presenting them with a chance to recover damages from it. For our purposes, to the extent that the applicants did not alienate their property, the attempt to do so by someone else was a nullity. Therefore the purported transfer from the applicants to the third respondent by Deed of Transfer No 1680/2009 was invalid as a non-owner could not transfer what he or she did not own. It follows therefore that the purported transfer from the third respondent to the current holders was also a monumental nullity. At all times the applicants legally retained ownership.

As a necessary consequence, the provisions of s 8 (2) of the Deeds Registries Act [Chapter 20:05] apply. It provides:

“Upon the cancellation of any deed pursuant of an order of court-

- (a) the deed under which the land or any real right in land was held immediately prior to the registration of the deed which is cancelled shall be revived to the extent of such cancellation unless a court orders otherwise; and
- (b) the registrar shall make the appropriate endorsement on the relevant deeds and entries in the registers.”

In the result, it is ordered, that:

1. The 4th respondent is hereby directed to cancel Deed of Transfer No 1680/2009 and Deed of Transfer No. 204/2011 in favour of the 3rd respondent and the 1st and 2nd respondents respectively in respect of the immovable property described as certain piece of land in the district of Goromonzi called Stand 816 Ruwa Township of Stand 659 Ruwa Township and to make any appropriate endorsements on the said Deeds of Transfer and entries in the registers to reflect the said cancellations.
2. Deed of Transfer No. 997/1997 is hereby declared the valid deed in respect of the immovable property described as certain piece of land situate in the district of Goromonzi called Stand 816 Ruwa Township of Stand 659 Ruwa Township.
3. The 1st and 2nd respondents and all those occupying through them the immovable property described as certain piece of land situate in the district of Goromonzi called Stand 816 Ruwa Township of Stand 659 Ruwa Township, shall give vacant possession of the said property to the applicants within fifteen (15) days of this order failing which the Sheriff of the High Court or his lawful deputy is hereby authorised and directed to evict them and give vacant possession to the applicants.
4. The 1st, 2nd and 3rd respondents shall bear the costs of suit jointly and severally the one paying the others to be absolved.

Coghlan Welsh & Guest, applicants’ legal practitioners
Farai Nyamayaro Law Chambers, 1st & 2nd respondent’s legal practitioners